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Interstate Extradition: Should the Asylum State Governor Have Unbridled Discretion

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Interstate Extradition: Should The Asylum State Governor Have Unbridled Discretion?

> The highest Good has like a halo shone
> About the Emperor's head, and he alone
> May validly accord it from above:
> The equity of Law!—What all men love,
> What all demand, desire, can't do without,
> His office must dispense it all about.[1]

I. INTRODUCTION

Kentucky v. Dennison[2] was a landmark decision of the United States Supreme Court concerning the extradition process provided for in the United States Constitution. In *Dennison*, Kentucky sought a writ of mandamus to compel the governor of Ohio to extradite an individual within Ohio's jurisdiction accused of criminal activities in Kentucky.[3] The Supreme Court refused to issue the writ, but did not make clear whether its refusal was based upon a state sovereignty argument or the belief that the duty of the asylum state governor was not a ministerial, mandatory duty subject to mandamus.[4] Nevertheless, the precedential value of *Dennison* was apparently not impaired by its ambiguity; no state again sought to use mandamus to compel extradition for over 110 years,[5] even when refusals of legally sufficient extradition requests occurred.[6]

On December 28, 1976, the State of South Dakota filed a petition for a writ of mandamus to compel the extradition from California of a convicted felon.[7] The petition was first consid-

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1. J. GOETHE, FAUST 122 (W. Arndt trans. 1976).

2. 65 U.S. (24 How.) 66 (1861).

3. *Id.* at 66.

4. *Id.* at 106-10.

5. *See* South Dakota v. Brown, 69 Cal. App. 3d 298, 138 Cal. Rptr. 14, 15 (1977), *vacated*, 20 Cal. 3d 765, 576 P.2d 473, 144 Cal. Rptr. 758 (1978) (the opinion has been deleted from 69 Cal. App. 3d and hereinafter Cal. App. 3d will not be cited). *Brown* was the first attempt since *Dennison* to use mandamus for extradition purposes.

6. *See* Comment, *Rendition: The Governor's Discretion*, 2 LINCOLN L. REV. 48, 55-56 (1966) [hereinafter cited as *Rendition*]; Comment, *Interstate Rendition: Executive Practices and the Effects of Discretion*, 66 YALE L. J. 97, 109-11 (1956) [hereinafter cited as *Interstate Rendition*].

7. The petition was originally filed on December 28, 1976, in the California Supreme

ered by the California Court of Appeal for the Third District, which held that the governor's duty to extradite was mandatory under state legislation. Since the governor was amenable to mandamus under California law, the Court accordingly issued the requested writ.[8] However, the California Supreme Court vacated this decision in *South Dakota v. Brown*.[9] The higher court held that although the duty of the governor can be characterized as mandatory, there is no provision for judicial compulsion of this duty under either federal law[10] or California's Uniform Criminal Extradition Act.[11]

South Dakota v. Brown and *Kentucky v. Dennison* are the only cases that directly confront the issue of judicial enforcement of the asylum state governor's duty to extradite. In 1861, *Dennison* held that the governor's duty under federal law was unenforceable by the federal courts.[12] In 1978, *Brown* extended this holding to the state courts of California by finding the duty unenforceable under state or federal law.[13] Both decisions were rendered in the presence of unusual pressures for and against extradition. This Comment will discuss the federal and uniform state extradition laws, examine the propriety of these two decisions, and suggest alternatives that might facilitate the resolution of extradition disputes and temper the use of gubernatorial discretion.

II. Historical Perspective

A. *Federal Law*

The process of interstate extradition, also known as interstate rendition,[14] provides for the return of one who has broken

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Court and then transferred to the court of appeal. South Dakota v. Brown, 138 Cal. Rptr. at 15 n.1.

8. The court declined to decide whether federal extradition provisions were enforceable in state courts. The decision of the court of appeal was based upon what it found to be a mandatory duty imposed by Cal. Penal Code § 1549.2 (West 1970). 138 Cal. Rptr. at 16.

9. 20 Cal. 3d 765, 576 P.2d 473, 144 Cal. Rptr. 758 (1978).

10. *Id.* at 771, 576 P.2d at 477, 144 Cal. Rptr. at 762. The federal law referred to is U.S. Const. art. IV, § 2, cl. 2.

11. 20 Cal. 3d at 773-74, 576 P.2d at 478-79, 144 Cal. Rptr. at 763-64. The statute is found at Cal. Penal Code §§ 1548-1556.2 (West 1970).

12. 65 U.S. (24 How.) at 109-10.

13. 20 Cal. 3d at 768, 576 P.2d at 475, 144 Cal. Rptr. at 760.

14. The terms *interstate rendition* and *extradition* are both used to describe the process of returning a fugitive to the state from which he fled, as set forth in article IV of the Constitution. *See Interstate Rendition, supra* note 6, at 97 n.1.

the law in one state and subsequently taken refuge in another. That this process is immensely important to the effective administration of our criminal justice system is an irrefutable proposition.

Interstate extradition is authorized by article IV of the United States Constitution, which states,

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.[15]

Apparently in response to objections that this clause did not specify the manner in which extradition was to be effected,[16] Congress passed enabling legislation that reposed the duty of returning a fugitive in the "executive authority" of the asylum state:

> [W]henever the executive authority of any state in the Union, or of [a territory], shall demand any person as a fugitive from justice, of the executive authority of any such state or territory to which such person shall have fled, . . . it shall be the duty of the executive authority of the state or territory to which such person shall have fled, to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demands, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear.[17]

Traditionally, the governor has carried out the duties of extradition as the "executive authority" of the state; he is specifically given this duty in the uniform state extradition legislation.[18]

B. Kentucky v. Dennison

The first case to directly consider the asylum state gover-

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15. U.S. CONST. art. IV, § 2, cl. 2.

16. *See* Hoague, *Extradition Between States*, 13 AM. L. REV. 181, 192-98 (1879).

17. Rendition Act of 1793, ch. 7, § 1, 1 Stat. 302 (current version at 18 U.S.C. § 3182 (1976)). The portion of the Act not included in the text discusses the legal sufficiency of the demand. The demanding-state governor must produce an affidavit or indictment charging the demanded fugitive with a crime, and he must personally certify its authenticity. *Id.*

18. *See* UNIFORM CRIMINAL EXTRADITION ACT § 2. *See generally* Conley, *Clearing the Fog (An Introduction to Extradition Law)*, 4 ORANGE COUNTY B.J. 157 (1977); Yager, *Extradition*, 33 CAL. ST. B.J. 527 (1958).

nor's duty under federal legislation was *Kentucky v. Dennison*.[19] In *Dennison*, the State of Kentucky attempted to compel the extradition from Ohio of Willis Lago, a "free man of color." Lago was sought by Kentucky for his criminal activities (under the laws of Kentucky) in helping a Negro slave escape from her master. Governor Dennison of Ohio refused to extradite the man because his actions were not illegal under the laws of Ohio. Therefore, Kentucky petitioned the United States Supreme Court for a writ of mandamus to compel Governor Dennison to extradite Lago.[20]

Chief Justice Taney, speaking for the Supreme Court, stated that the "treason, felony, or other crime" language of article IV of the Constitution contemplated any offense that was punishable under the laws of the state where it was committed. Consequently, no equivalent law in the asylum state was required for the offense to be extraditable.[21] Moreover, the Court found that the duty of a governor under the Constitution and federal legislation "certainly is not a discretionary duty upon which he is to exercise any judgment, but is a mere ministerial duty."[22] Nevertheless, the Court held that "if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him."[23]

As a result of *Dennison*, the idea of an extradition duty mandatory in nature but unenforceable in practice was established. Although the Court attempted to resolve this apparent contradition by identifying the duty as *moral* rather than a *legal*,[24] the Court's rationale has been the subject of criticism. Those who take issue with the holding and rationale of *Dennison* question whether the authors of the Constitution would have included a clause containing mandatory language if they had intended that it confer no enforceable duty.[25]

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19. 65 U.S. (24 How.) 66 (1861).

20. *Id.* at 66-67.

21. *Id.* at 103.

22. *Id.* at 106.

23. *Id.* at 109-10.

24. *Id.* at 107.

25. *E.g.*, *Rendition*, *supra* note 6, at 58-59; *Interstate Rendition*, *supra* note 6, at 112. "Proponents of [the repudiation of *Dennison*] argue that *Dennison* was decided wrongly since the constitutional drafters would never have included a provision mandatory in language but unenforceable in practice." *Id.*

Given its historical context, the *Dennison* case brought unusual pressures to bear upon the Court. The decision was rendered on the eve of the Civil War, when both slavery and states' rights were highly sensitive and emotionally charged issues. Furthermore, Chief Justice Taney, author of the *Dennison* opinion, was a Southerner and former slaveholder who retained a definite personal prejudice against blacks.[26] As a Southerner, he was also a strong advocate of states' rights.[27] Nevertheless, in spite of the strong emotional and political pressures surrounding the case, the *Dennison* rationale was generally approved of at the time.[28] It has since been reaffirmed by the Supreme Court[29] and supported, in dicta, by several state court decisions.[30]

C. *The Uniform Criminal Extradition Act*

It has long been acknowledged that a state has the prerogative to legislate to the extent that such legislation does not conflict with the Constitution and federal legislation. Thus, states are free to extend extradition beyond the requirements of federal law, but they cannot limit the federal extradition requirements.[31] The Uniform Criminal Extradition Act (UCEA), en-

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26. Taney's prejudice is evidenced by his writings:

> In [Taney's] private papers, he said that the African race, ". . . even when free, are everywhere a degraded class . . . " and were only citizens at the sufferance of the white majority. "They were never regarded as a constituent portion of the sovereignty of any state . . . " and thus ". . . hold whatever rights they enjoy at . . . " the mercy of the white population.

Rendition, supra note 6, at 59 n.48.

27. Taney's states' rights position has been viewed as influential in shaping the *Dennison* opinion:

> The [*Dennison*] opinion has been attributed to Chief Justice Taney's states' rights theories. . . .
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> . . . Taney was formerly a slaveholder, and felt the same way that most other Southerners felt about states' rights and the Negro. The states should be protected from federal encroachments and thus should have the right to choose whether they shall be slave or free.

Id.

28. *Interstate Rendition, supra* note 6, at 112 n.82.

29. Taylor v. Taintor, 83 U.S. (16 Wall.) 366, 370 (1873).

30. *See, e.g.*, People v. Millspaw, 257 A.D. 40, 41, 12 N.Y.S.2d 435, 437, *rev'd on other grounds*, 281 N.Y. 441, 24 N.E. 2d 117 (1939); State v. Coughlin, 90 Wash. 2d 835, 838, 586 P.2d 1145, 1147 (1978). *See also* Carpenter v. Lord, 88 Or. 128, 132, 171 P. 577, 578 (1918); *In re* Wallace, 38 Wash. 2d 67, 69, 227 P.2d 737, 738 (1951).

31. *E.g.*, New York v. O'Neill, 359 U.S. 1, 6 (1959) ("[A]ccording the statute the full benefit of the presumption of constitutionality which is the postulate of constitutional adjudication, we must find clear incompatibility with the United States Constitution. . . . [If there is none, it] is within the unrestricted area of action left to the States by the Constitution."); *In re* Cooper, 53 Cal. 2d 772, 775, 349 P.2d 956, 957, 3 Cal. Rptr.

acted in most jurisdictions,[32] exerts this reserved power. The UCEA is broader than federal extradition law (*e.g.*, it covers the extradition of nonfugitives) and also confers a distinct discretionary power upon the asylum governor in extradition situations not covered by federal law.[33] Nevertheless, as to the rendition of fugitive criminals—which is the area covered by federal statutes—the wording of the UCEA is very similar to that of federal law.[34] Moreover, in many cases, court interpretations of this portion of the UCEA have been similar to that of *Dennison*, *i.e.*, although the duty of the asylum governor is often described as mandatory or ministerial, it is considered unenforceable by the courts.[35]

A number of state courts, in adherence to the separation of powers concept, refuse to issue a writ of mandamus to compel the governor to fulfill a ministerial obligation.[36] These courts would undoubtedly apply the same reasoning if requested to

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140, 141 (1960) ("It is settled, however, that the federal constitutional and statutory provisions are not exclusive and that the states are free to cooperate with one another by extending interstate rendition beyond that required by federal law.")

32. As of January 1980, only the District of Columbia, Mississippi, and South Carolina had not adopted the Uniform Criminal Extradition Act. It is in force in 51 jurisdictions, including 48 states. 11 UNIFORM LAWS ANNOTATED 10 (West Supp. 1980).

33. The UCEA provides the following:

> The Governor of this state may also surrender, on demand of the Executive Authority of any other state, any person in this state charged in such other state . . . with committing an act in this state, or in a third state, intentionally resulting in a crime in the state whose Executive Authority is making the demand . . . .

UNIFORM CRIMINAL EXTRADITION ACT § 6.

34. The fugitive provisions of the UCEA state the following:

> Subject to the provisions of this act, the provisions of the Constitution of the United States controlling, and any and all acts of Congress enacted in pursuance thereof, it is the duty of the Governor of this state to have arrested and delivered up to the Executive Authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who has fled from justice and is found in this state.

Id. § 2.

35. *See, e.g., Ex parte* Cohen, 23 N.J. Super. 209, 215, 92 A.2d 837, 840 (Super. Ct. App. Div. 1952), *aff'd*, 12 N.J. 362, 96 A.2d 794 (1953)); Moreaux v. Ferrin, 98 Utah 450, 454, 100 P.2d 560, 563 (1940) ("The duty to issue a warrant upon receipt of a proper requisition is ministerial, and although there is no authority whereby anyone may compel the Governor to issue his warrant if he refuses to do so, nevertheless, the act is not a discretionary one.") *See also* 31 AM. JUR. 2d *Extradition* § 48, at 956-57 (1967). *But see In re* Morgan, 244 Cal. App. 2d 903, 910, 53 Cal. Rptr. 642, 647 (1966); *In re* Harris, 170 Ohio St. 151, 154, 163 N.E.2d 762, 765 (1959).

36. *Interstate Rendition, supra* note 6, at 99 n.13 ("Eighteen states refuse to direct a writ of mandamus to the governor under any circumstances.") *See, e.g.*, State v. Cone, 137 Fla. 496, 497, 188 So. 93, 93 (1939).

compel the governor to extradite a fugitive. Other state courts will direct a writ of mandamus to the governor to compel the performance of certain ministerial functions.[37] Nevertheless, although no case considering this specific issue arose before *Brown*,[38] dicta in the opinions of several of these courts indicate that they would not issue mandamus to compel the governor to extradite,[39] even though it appears to be a ministerial duty.

D. Extradition in California[40]

South Dakota v. Brown[41] was only the second case to consider the nature of the asylum state governor's duty to extradite.[42] To comprehend the significance of this decision, a basic understanding of California extradition law is essential.

In the case *In re Manchester*,[43] a decision predating *Dennison*, the California Supreme Court stated in dictum that "the Courts of the State possess no power to control the Executive discretion and compel a surrender [of a fugitive]."[44] The language of California's original extradition statute, still in effect at that time, was similar to that of the federal statute:

> A person charged in any State or Territory of the United States, with treason, felony, or other crime, who shall flee from justice, and be found in this State, shall on demand of the ex-

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37. *Interstate Rendition, supra* note 6, at 99 n.14 ("Twenty states will direct a governor to perform a ministerial function.") *See, e.g.*, Jenkins v. Knight, 46 Cal. 2d 220, 222, 293 P.2d 6, 7 (1956).

38. South Dakota v. Brown, 138 Cal. Rptr at 15.

39. *E.g., Ex parte* Cohen, 23 N.J. Super. 209, 215, 92 A.2d 837, 840 (Super. Ct. App. Div. 1952), *aff'd* 12 N.J. 362, 96 A.2d 694 (1953); People v. Millspaw, 257 App. Div. 40, 41, 12 N.Y.S.2d 435, 437 *rev'd on other grounds*, 281 N.Y. 441, 24 N.E. 2d 117 (1939). These courts supported this dicta primarily by reliance on *Dennison*, 65 U.S. (24 How.) 66 (1861) and other Supreme Court decisions, like, for example, Taylor v. Taintor, 83 U.S. (16 Wall.) 366 (1873).

40. *See generally* Conley, *supra* note 18; Mosk, *Extradition Procedure in California*, 14 CAL. ST. B.J. 121 (1939); Yager, *supra note 18.*

41. 20 Cal. 3d 765, 576 P.2d 473, 144 Cal. Rptr. 758 (1978).

42. South Dakota v. Brown, 138 Cal. Rptr at 15.

43. 5 Cal. 237 (1855). This case concerned a petition for a writ of habeas corpus to test the sufficiency of an extradition warrant.

44. *Id.* at 238. It should be noted that the idea that the governor could not be compelled to extradite had been suggested long before *Dennison*. As one authority observed:

> The Supreme Court had intimated in the case of *Prigg v. Commonwealth*, nearly twenty years before [*Dennison*], that there was no power lodged in the general government to compel State officers to perform the duties imposed upon them in the act of 1793; and Chancellor Kent had expressed the same opinion in his Commentaries many years earlier.

Hoague, *supra* note 16, at 214 (footnotes omitted).

> ecutive authority of the State or Territory from which he fled, be delivered up by the Governor of this State, to be removed to the State having jurisdiction of the crime.[45]

Apparently the court interpreted this statute as investing the asylum governor with a discretionary duty to extradite a fugitive, since the court specifically used the term "discretion" in *Manchester*.

The California extradition provisions were revised in 1872. The only significant change from the version previously quoted was the substitution of "must, on demand" for the words "shall on demand."[46] This particular change was never interpreted by the courts until *Brown*.[47]

The California extradition law was not changed again until the adoption of the UCEA in 1937.[48] The UCEA was enacted with only one significant variation from the uniform model.[49] California was the only jurisdiction to alter section 7 so that it no longer appeared to confer any gubernatorial discretion. Section 7 of the UCEA states: "If the Governor decides that the demand should be complied with, he shall sign a warrant of arrest . . . ."[50] In California this section was changed to read, "If a demand conforms to the provisions of this chapter, the Governor or agent authorized in writing by the Governor . . . shall sign a warrant of arrest . . . ."[51] Taken at face value, this change appears to leave little room for discretion.

Since the adoption of the UCEA there have been instances when, although the requests for extradition fulfilled the statutory requirements, the Governor of California has exercised his discretion in refusing to extradite individuals. He has done so on the basis of equitable concerns.[52] Likewise, legal scholars have

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45. California Criminal Practice Act, ch. 29, § 665, 1851 Cal. Stats. 286 (current version at CAL. PENAL CODE §§ 1548-1548.3 (West 1970)).

46. CAL. PENAL CODE § 1548 (1872)(current version at CAL. PENAL CODE §§ 1548-1548.3 (West 1970) (the references to "territories" were also deleted).

47. The *Brown* court found this change to more imperative wording to be of "little, if any, significance." 20 Cal. 3d at 772, 576 P.2d at 478, 144 Cal. Rptr. at 763.

48. CAL. PENAL CODE §§ 1548-1556.2 (West 1970).

49. There have been various alterations of the UCEA in the various jurisdictions that have adopted it. *See* 11 UNIFORM LAWS ANNOTATED 60-295 (West 1974).

50. UNIFORM CRIMINAL EXTRADITION ACT § 7.

51. CAL. PENAL CODE § 1549.2 (West 1970).

52. *See* Mosk, *supra* note 40, at 125, where the author gave the following example:

> Occasionally there arises an exceptional case in which the ends of justice require particular consideration. Just recently a southwestern state sought the return of a man on a charge of having escaped from its state penitentiary.

noted that the Governor of California has the power to exercise some discretion in the area of extradition.[53] On the other hand, *Brown* was the first significant comment by the California courts dealing with the Governor's discretion in extradition since *Manchester*.[54] Before *Brown*, the courts that considered the extradition duty, although only in dicta, characterized it not as a "matter of mere comity" but as an "absolute duty."[55]

It would seem that the lack of a means of compulsion would not be a valid reason for nonenforcement of a ministerial or absolute duty to extradite in California, since the writ of mandamus has regularly been issued to the governor by the California courts to compel the performance of ministerial duties.[56] As the California Supreme Court stated in *Jenkins v. Knight*,[57] "[I]t has been consistently held for more than three quarters of a century that the writ [of mandamus] will issue to compel a governor to perform ministerial acts required by law."[58]

> Originally sentenced for five years on a burglary charge, the prisoner escaped seventeen years ago. During these past seventeen years, he changed his name, married, was expecting a child, worked regularly as a garage mechanic, was from time to time entrusted with large sums of money, and became favorably known in church and community activities. Finally, however, his employer was compelled to lay him off because of business reverses, and, being unable to find other employment, in desperation he sought a job as a WPA crossing guard and submitted to fingerprinting. In that manner he was apprehended. Since the purpose of imprisonment should be rehabilitation of the prisoner, and since this man had over seventeen long years indicated that he was a fully rehabilitated member of society, it would seem to have been a miscarriage of justice to have returned him to the demanding state. Governor Olson declined to return him.

Id.

53. *See* Conley, *supra* note 18, at 160; Mosk, *supra* note 40, at 125; Yager, *supra* note 18, at 535.

54. *But cf. In re* Cooper, 53 Cal. 2d 772, 779, 349 P.2d 956, 959, 3 Cal. Rptr. 140, 143 (1960) ("Protection from unjustified extradition does not lie in reading into the extradition laws purely technical requirements . . . but in the sound judgment of the respective Governors charged with the administration of those laws. Their judgment is entitled to great weight.").

55. *E.g., In re* Russell, 12 Cal. 3d 229, 234, 524 P.2d 1295, 1298, 115 Cal. Rptr. 511, 514 (1974); *In re* Romaine, 23 Cal. 585, 590 (1863); *In re* Golden, 65 Cal. App. 3d 789, 795, 135 Cal. Rptr. 512, 515 (1977); *In re* Morgan, 244 Cal. App. 2d 903, 910, 53 Cal. Rptr. 642, 647 (1966). *But cf. In re* Cooper, 53 Cal. 2d 772, 779, 349 P.2d 956, 959, 3 Cal. Rptr. 140, 143 (1960) (judgment of governors is entitled to great weight in the administration of extradition laws).

56. *See, e.g.* Hollman v. Warren, 32 Cal. 2d 351, 360, 196 P.2d 562, 568 (1948); Elliott v. Pardee, 149 Cal. 516, 520, 86 P. 1087, 1089 (1906); Harpending v. Haight, 39 Cal. 189, 212-13 (1870).

57. 46 Cal. 2d 220, 293 P.2d 6 (1956).

58. *Id.* at 223, 293 P.2d at 7.

III. Extradition Under *South Dakota v. Brown*

A. Background

South Dakota v. Brown[59] is the only case since *Dennison* to directly consider the nature and enforceability of the asylum state governor's duty to extradite. It is important because it deals with the use of a writ of mandamus by a state court to enforce the governor's duty under either federal or state law.

In July 1975, Dennis James Banks was convicted in South Dakota of two felonies, armed riot and assault with a dangerous weapon without intent to kill. Banks was released on bail while awaiting sentencing. Before sentencing, Banks fled South Dakota and was subsequently apprehended on February 13, 1976, in California. On about February 15, 1976, Governor Edmund G. Brown, Jr. of California received documents from South Dakota requesting the extradition of Banks back to that state. The California Attorney General examined the extradition demand and found that it appeared to substantially comply with the requirements of the extradition laws.[60]

On December 28, 1976, South Dakota filed a petition for a writ of mandamus to compel Governor Brown to issue an extradition warrant, since he had failed to take any action on the extradition demand.[61] The state of South Dakota based its petition on the premise that both federal law and the California UCEA imposed a ministerial duty on Governor Brown to extradite Dennis Banks.[62] Furthermore, it was South Dakota's contention that this ministerial duty was enforceable by the California Supreme Court through a writ of mandate.[63]

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59. 20 Cal. 3d 765, 576 P.2d 473, 144 Cal. Rptr. 758 (1978).

60. South Dakota v. Brown, 138 Cal. Rptr. at 18.

61. In his reply to an order to show cause why South Dakota's petition should not be granted, Governor Brown asserted:

> [I]t is not the prerogative of either the courts or the Legislature to compel the Governor to exercise his discretion in any particular manner or to force him to make decisions which he is not yet prepared to make. If the Governor, or any elected official, abuses discretion which he alone is empowered to exercise, he is answerable to the electorate and not to the courts.

Id.

62. Petition for Writ of Mandate at 12-17, South Dakota v. Brown, 138 Cal. Rptr. 14 (Ct. App. 1977).

63. *Id.* at 10-11.

B. The Brown *Opinion*

1. Federal extradition provisions

The California Supreme Court rejected South Dakota's argument that the Federal Constitution and California legislation imposed a duty on Governor Brown enforceable by a California court. The court relied heavily on the *Dennison* holding that although the duty of the governor is ministerial, there is no power delegated to the "general government" to compel him to extradite.[64] Although South Dakota had not attacked *Dennison*, it unsuccessfully sought to limit the application of *Dennison* to cases involving the exercise of federal mandamus.[65] The court rejected this contention, noting that South Dakota could not cite even one case in which a state court had used mandamus to compel extradition.[66] The California court also emphasized the acceptance of the *Dennison* holding by the courts of several other states that the duty to extradite is unenforceable through judicial sanction.[67]

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64. *See* 20 Cal. 3d at 769, 576 P.2d at 475-76, 144 Cal. Rptr at 760-61.

In *Dennison*, the Supreme Court stated: "[I]f the Governor . . . refuses to discharge this duty, there is no power delegated to the General Government, either through the Judicial Department or any other department, to use any coercive means to compel him." Kentucky v. Dennison, 65 U.S. (24 How.) 66, 109-110 (1861). This holding was reaffirmed by the Court in Taylor v. Taintor, 83 U.S. (16 Wall.) 366 (1872), which stated, "If [the governor] refuse [to extradite a fugitive], there is no means of compulsion." *Id.* at 370.

The Court's concern for states' rights was a primary consideration in the *Dennison* holding:

> [W]e think it clear, that the Federal Government, under the Constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State . . . .

65 U.S. (24 How.) at 107-08.

65. Petition for Writ of Mandate at 21-22.

66. Regarding the lack of precedent for the issuance of mandamus, the *Brown* court stated the following:

> [P]etitioner has neither cited, nor have we found, a single case in the history of the Republic in which *any* state court has issued mandamus to compel extradition . . . . The absence of such authority appears to reflect the uniform acceptance of the highest state courts that, following *Dennison* and *Taylor*, without any specific implementing legislation, the constitutional duty of the state executive to extradite a fugitive is not judicially enforceable by either federal or state sanction.

20 Cal. 3d at 770, 576 P.2d at 476, 144 Cal. Rptr. at 761.

67. *Id.*

2. California's extradition law

The California Supreme Court recognized the right of states to provide for the extradition of persons whose extradition was not required by federal legislation. Nevertheless, it also rejected South Dakota's alternative assertion that the California UCEA provided an independent basis for state judicial enforcement of the extradition demand.

The court acknowledged the fact that California was the only jurisdiction to seemingly remove the hint of gubernatorial discretion from section 7 of the UCEA in favor of a mandatory provision.[68] However, the court noted the similarity of the revised section (section 1549.2 of the California Penal Code) to the extradition clause of the Federal Constitution and to previous state legislation modeled after the federal clause.[69] Because there was no record of any contradictory legislative intent, such continuity was interpreted as an effort to maintain the historic discretionary significance of the language.[70] Therefore, the court concluded that this change in the California UCEA, despite its mandatory language, was indicative of an unenforceable, discretionary duty.[71]

The *Brown* court emphasized that its holding was reinforced by "contemporaneous administrative construction"[72] of the UCEA by several California governors. These governors had exercised discretion by declining extradition requests that were in proper form,[73] and the court decided to not depart from the governors' administrative construction.[74]

Finally, the court stressed the public policy considerations that supported an interpretation of the UCEA permitting gubernatorial discretion. The court anticipated various situations that would not respond to the "mechanical application of fixed and

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68. *Id.* at 771, 576 P.2d at 477, 144 Cal. Rptr. at 762.

69. *Id.* at 773-74, 576 P.2d at 478-79, 144 Cal. Rptr. at 763-64.

70. *Id.*

71. *Id.*

72. *See, e.g.*, City of Los Angeles v. Rancho Homes, Inc., 40 Cal. 2d 764, 770-71, 256 P.2d 305, 308 (1953) (quoting Coca-Cola Co. v. State Bd. of Equalization, 25 Cal. 2d 918, 921, 156 P.2d 1, 2-3 (1945)). In this case, the court stated: "[T]he contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized." *Id.*

73. 20 Cal. 3d at 777-78, 576 P.2d at 481-82, 144 Cal. Rptr. at 766-67.

74. *Id.*

absolute rules if justice is to be achieved in a particular case."[75] Consequently, according to the court, gubernatorial discretion to deny extradition was necessary to avert injustice. Three examples were given: (1) a case in which the fugitive has been a "worthy law-abiding citizen" since residing in the asylum state, (2) a case in which the fugitive's "physical safety or right to a fair trial cannot be assured in the demanding state," or (3) a case in which "the offense charged does not constitute a crime in [the asylum state]."[76] In light of these considerations, the court concluded that "as a matter of public policy courts may not enforce the Governor's duty to comply with extradition demands. . . . We would not serve the ends of justice if we attempted judicial interference with the Governor's discretion."[77] Furthermore, the court observed that the governor could only be compelled by mandamus *to exercise* his discretionary power. In other words, when "[f]aced with such a demand [for the extradition of a fugitive] the Governor may say yes or no. What he may not do is say nothing."[78]

3. *The Mosk Opinion*

Justice Mosk, joined by Justice Clark, dissented from the majority opinion in *Brown*. This is noteworthy since Justice Mosk was formerly a secretary to the governor of California in charge of extradition proceedings.[79] Justice Mosk first emphasized the position of the California courts that mandamus will issue to enforce a ministerial duty imposed by law upon the governor.[80] He also felt that the authority of *Dennison* had been overextended by the majority opinion. According to the dissent, *Dennison* and the federal cases following it are "merely authority for the proposition that under our federal system of government, federal courts cannot direct governors of sovereign states to comply with their duty. . . . [I]t did not purport to deny to the states their right to compel state governors to adhere to constitutional and statutory commands."[81] Mosk felt that the rigid

75. *Id.* at 779, 576 P.2d at 482, 144 Cal. Rptr. at 767.
76. *Id.*
77. *Id.*
78. *Id.* at 780, 576 P.2d at 483, 144 Cal. Rptr. at 768.
79. Mosk, *supra* note 40, at 121.
80. 20 Cal. 3d at 781-82, 576 P.2d at 483-84, 144 Cal. Rptr. at 768-69 (Mosk, J., dissenting).
81. *Id.*

federalism of *Dennison* might not be followed today if the same issue came before the Supreme Court.[82]

Turning to the nature of the governor's duty to extradite, Justice Mosk first emphasized that the federal and state extradition provisions speak of the duty of the asylum state governor in mandatory terms.[83] Moreover, the United States Supreme Court held that the duty is ministerial in nature, not discretionary.[84] In this regard, Justice Holmes said, "The Constitution . . . peremptorily requires that upon proper demand, the person charged shall be delivered up to be removed to the State having jurisdiction of the crime. There is no discretion allowed, no inquiry into motives."[85] The dissent also stressed that the California Supreme Court and other California courts had also characterized the duty to extradite under the Federal Constitution as being mandatory in nature;[86] for example, extradition was described by the California Supreme Court as "an absolute right of the demanding state and duty of the asylum state under the federal Constitution."[87]

Justice Mosk next considered the majority's interpretation of the California UCEA and found it to be misguided. Section 1549.2 of the California Penal Code had been altered from the less mandatory language of the UCEA to express the duty of the governor in clearly mandatory terms. The dissent found this factor to totally negate the majority's attempts to demonstrate a legislative intent to grant discretion.[88]

The majority opinion also cited examples of contemporaneous administrative construction of the extradition laws. In this regard, it quoted an article by Justice Mosk that gives several examples of situations in which California governors had denied extradition. Nevertheless, Justice Mosk refuted the inference that the denials by California governors were indicative of a discretionary duty. He reiterated a paragraph from his article describing the narrow limits of the governor's inquiry upon re-

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82. *Id.* at 781 n.1, 576 P.2d at 484 n.1, 144 Cal. Rptr. at 769 n.1.

83. *Id.* at 782, 576 P.2d at 484, 144 Cal. Rptr. at 769.

84. *Id. See* Kentucky v. Dennison, 65 U.S. (24 How.) 66, 106 (1861).

85. Drew v. Thaw, 235 U.S. 432, 439-40 (1914) (citations omitted).

86. 20 Cal. 3d at 782-83, 576 P.2d at 484-85, 144 Cal. Rptr. at 769-70 (Mosk, J., dissenting).

87. *In re* Russell, 12 Cal. 3d 229, 234, 524 P.2d 1295, 1298, 115 Cal. Rptr. 511, 514 (1974).

88. 20 Cal. 3d at 783-84, 576 P.2d at 485, 144 Cal. Rptr. at 770 (Mosk, J., dissenting).

ceiving an extradition request. The inquiry basically comprised a determination of the sufficiency of the demand; inquiry into the crime itself or the guilt of innocence of the fugitive was prohibited.[89] Therefore, the governors who denied extradition contravened their mandatory duty only because of unusual and compelling circumstances.[90] Justice Mosk stated that "[i]n those 'exceptional' instances, the Governors of California realized they were failing to meet their extradition obligations and forthrightly explained their reasons in a communication to the Governor of the demanding state."[91] Moreover, judicial review was lacking because none of those actions was ever challenged in court.[92]

After consideration of all of the above factors, Justice Mosk concluded that

> [t]he interests of an effective and impartial criminal justice system, and the prevention of discord and retaliation among the states of the union, are best preserved by the enforcement of the Governor's mandatory duty to issue his warrant in response to a proper request for extradition. Should the fugitive believe the demand to be legally insufficient, he may review the proceedings by means of habeas corpus.[93]

In his opinion, the validity of this conclusion was "compounded when, as here, the fugitive has already been tried, found guilty of serious felonies, and has fled to avoid imposition of sentence."[94]

IV. Propriety of the *Dennison* and *Brown* Decisions

A. Dennison

The *Dennison* and *Brown* decisions are unique not only because they are the only cases to directly confront the nature of the asylum state governor's extradition duty,[95] but also because of the unusual circumstances surrounding their proceedings. The facts of *Dennison* reveal the potential for a controversial decision. The offense charged was that of assisting in the escape of a

89. *Id.* at 784-85, 576 P.2d at 485, 144 Cal. Rptr. at 770.
90. *Id.* at 785, 576 P.2d at 486, 144 Cal. Rptr. at 771.
91. *Id.* at 785 n.2, 576 P.2d at 486 n.2, 144 Cal. Rptr. at 771 n.2.
92. *Id.* at 785, 576 P.2d at 486, 144 Cal. Rptr. at 771.
93. *Id.* at 787, 576 P.2d at 487, 144 Cal. Rptr. at 772.
94. *Id.*
95. South Dakota v. Brown, 138 Cal. Rptr. at 15.

slave; the offender was a "free man of color." The governor of Ohio, a free state, refused to extradite because the asserted offense was not a crime in Ohio. Therefore, Kentucky petitioned for a writ of mandamus to compel the extradtion. This brief synopsis reveals a situation in which any result would be offensive to the government and society of one of the states.

If one looks beyond the confines of the opinion, the gravity of the decision facing the Court becomes even more obvious. Not only did the case directly involve the slavery problem, but it also arose just prior to, and served as a catalyst for, the Civil War.[96] Chief Justice Taney, the author of the *Dennison* opinion, was certainly not isolated from the controversy: he was an advocate of states' rights and a former slaveholder.[97] In addition, the other justices were surely aware of the pulse of the nation.

In view of the political and social pressures involved, the Supreme Court reached the practical result in *Dennison. Dennison* is the only case in which the Supreme Court has been asked to issue mandamus to a governor.[98] The emphasis at that time was on state sovereignty at the expense of a strong federal government. The slave states wanted to retain the status quo in order to preserve their unique life style. Kentucky had esentially asked the Court to open a Pandora's Box by requesting the Court to compel Ohio's governor to extradite in defiance of the principle of state sovereignty. The Court's response was simple: the federal government was not empowered to compel the governor to extradite. This ruling was in harmony with the concept of state sovereignty and was more favorable for Kentucky's long-term interests than the remedy for which it had petitioned. Avoiding the possibility of federal-state conflict was impliedly one basis for the Court's decision.

However practical the result, the *Dennison* rationale was suspect. First, the Court said the governor's duty was "not a discretionary duty upon which [the governor] is to exercise any judgment" but was "a mere ministerial duty." Thereafter, the Court designated the duty a "moral" rather than a "legal" duty. Perhaps the Court was simply describing the effect of the federal government's inability to enforce the governor's duty, but the Court's intention was not clearly elucidated. The result was

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96. The *Dennison* case was decided in 1861. Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861). *See also* 138 Cal. Rptr. at 15 n.3.

97. *Rendition, supra* note 6, at 59 n. 48.

98. *Interstate Rendition, supra* note 6, at 98 n.9.

an ambiguous characterization of the asylum state governor's duty.

Although the decision met with general approval at the time, *Dennison* was later criticized. As indicated above, the critics questioned whether the drafters of the Constitution would have couched the governor's duty to extradite in mandatory terms without intending that it be enforceable. This criticism is not well-founded as applied to the *Dennison* holding because of *Dennison's* underlying rationale that the U.S. Constitution does not contemplate the exercise of such an extensive power by the federal government over the executive branch of the states. However, the implicit criticism of *Dennison*'s ambivalence on the nature of the duty is justified.

In the final analysis, the *Dennison* holding was proper and is supported by the concept that the federal courts were not empowered to exercise mandamus to compel the governor of a state to fulfill his mandatory duties. This fact notwithstanding, the decision may be justly criticized for its vacillation on the nature of the governor's duty. The governor's duty is couched in mandatory terms and could properly have been interpreted as a ministerial duty within the state's exclusive sovereign power, and therefore unenforceable by the *federal* courts. Moreover, the ultimate effect of *Dennison*'s fuzzy reasoning was to create a hybrid duty—a mandatory duty unenforceable in state and federal courts. This concept was reinforced by *South Dakota v. Brown.*

B. South Dakota v. Brown

1. Historical abstract

Brown was also accompanied by a complicated and controversial factual situation. Dennis Banks, whom South Dakota sought to extradite, was a leader of the liberal American Indian Movement.[99] In 1973 he was involved in an incident at the Custer County Courthouse in South Dakota. A young Indian had been stabbed to death by a white man, and the dead man's mother asked Banks for assistance in seeking justice. Consequently, Banks and others demonstrated at the courthouse against the minimal bail that had been set for the accused killer. According to one report, the demonstrators were met by police

99. Rubin, *Dennis Banks's Extradition Fight*, 94 CHRISTIAN CENTURY 691, 691 (1977) [hereinafter cited as *Banks*]; Rubin, *South Dakota v. Dennis Banks*, 225 NATION 113, 113 (1977) [hereinafter cited as *Dennis Banks*].

outfitted with tear gas and guns. In the ensuing fray, the courthouse and chamber of commerce were set on fire. Banks was arrested three days later and was subsequently convicted for his role in the incident.[100]

The controversy was further complicated because of the acrimonious relationship that existed between Banks and South Dakota's attorney general, William Janklow. In 1967, while Janklow was serving as a legal advisor to the Rosebud Sioux, he was identified in tribal court by a 15-year-old Indian rape victim as her assailant. The incident was investigated and a report was submitted to the FBI, but no charges were ever brought against Janklow.[101]

In 1972 Banks initiated another investigation of the case. When the case was finally heard by the tribal court in 1974, Banks was the attorney of record at the proceeding. Janklow was summoned but did not appear before the tribal court, and the Bureau of Indian Affairs area director refused to deliver documents subpoenaed from the rape file. Nevertheless, based on the testimony of the victim and the original investigator, the tribal court found probable cause that Janklow was guilty of two offenses under the tribal code. As a result, the tribal court disbarred him from practicing law on the reservation.[102]

In 1975, before Banks was sentenced in Custer County, he fled South Dakota for California. He claimed that serving a jail term in South Dakota would jeopardize his life.[103] When South Dakota sought to extradite Banks, Governor Brown received numerous documents urging denial of South Dakota's request for "a variety of substantial reasons."[104] His decision not to act on the demand prompted South Dakota to petition the Supreme Court of California for a writ of mandamus to compel the extradition. The supreme court transferred the petition to the court of appeal.

The court of appeal concluded that the governor's duty to extradite under the California UCEA was mandatory and issued a writ of mandamus. During the trial the court denied a motion by Banks' attorney to introduce evidence why he should not be

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100. *Banks, supra* note 99, at 692; *Dennis Banks, supra* note 99, at 114.
101. *Dennis Banks, supra* note 99, at 113. *See Banks, supra* note 99, at 692.
102. *Dennis Banks, supra* note 99, at 113-14. *See Banks, supra* note 99, at 692.
103. *Banks, supra* note 99, at 691.
104. *Banks, supra* note 99, at 691; *Dennis Banks, supra* note 99, at 115.

extradited.[105] On appeal, the Supreme Court of California vacated the decision of the court of appeal and held that the governor's duty was unenforceable by the courts through a writ of mandate.[106] Consequently, Banks was not extradited.

2. *Analysis of* Brown

The most influential portion of the majority's rationale in *Brown* was the discussion of the public policy considerations that, according to the majority, compelled a discretionary, unenforceable duty. The court observed that the "individual circumstances surrounding extradition demands are varied and diverse, thus rendering peculiarly inappropriate the mechanical application of fixed and absolute rules if justice is to be achieved in a particular case."[107]

The court reasoned that mandamus, a legal remedy, is insensitive to the equitable considerations that the governor may consider if he has discretion to do so. If the governor's duty were mandatory, on the other hand, fugitives would be forced to seek their remedies following extradition in the demanding state's court system. That court system may be insensitive to, or incapable of, considering their equitable pleas.[108] Mandamus is also insensitive to due process violations and substantive defenses, two other types of pleas to which gubernatorial discretion has been responsive under certain circumstances—even though the use of discretion in such cases may not be advisable.[109] Gubernatorial discretion can resolve those cases where the demanding state still desires to enforce the demand, despite the presence of compelling equities.[110] Enforcement of the demand through mandamus could cause a grave miscarriage of justice in such a situation. In fact, the court of appeal was faced with this very situation in *Brown* when it denied a motion to admit evidence of an equitable nature. The court was compelled to follow an inflexible course of action in enforcing what it found to be a mandatory, enforceable duty. The court believed that it could not consider evidence which Banks' attorney asserted would

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105. *Dennis Banks, supra* note 99, at 115.

106. South Dakota v. Brown, 20 Cal. 3d 765, 576 P.2d 473, 144 Cal. Rptr. 758 (1978).

107. *Id.* at 779, 576 P.2d at 482, 144 Cal. Rptr. at 767.

108. *See id.*; BALLENTINE'S LAW DICTIONARY 770 (3d ed. 1969) (mandamus is an action at law rather than an equitable remedy).

109. *Interstate Rendition, supra* note 6, at 106-11.

110. *Id.*

demonstrate a threat to the fugitive's life.[111]

The Mosk opinion, which favored enforcement by mandate, indicated that the fugitive could seek review of the extradition proceeding by means of habeas corpus if he believed the extradition demand to be legally insufficient.[112] However, the scope of inquiry in a habeas corpus proceeding is very limited, and although this option is available to a fugitive, it is no more sensitive to equitable considerations than mandamus. As one commentator has observed: "[I]n a habeas corpus proceeding, it is the function of the court merely to determine whether a crime has been charged in the demanding state, and whether the fugitive in custody . . . is the person so charged. Equitable defenses are unacceptable."[113]

Although the court was correct in questioning the ability of the asylum state courts to do justice in a particular case, the court seemed to ignore the fact that the extradition process is designed to return the fugitive to the criminal justice system primarily concerned with the disposition of his case. Isn't it possible that justice can be done in the courts of the demanding state? This would appear to be the determinative issue, but it was not directly addressed by the court. The implication of the court's discussion was that the extradition demand itself constituted an injustice in the face of certain equitable considerations, *e.g.*, where the individual sought had established himself as a valued member of an asylum state community. In such cases, the court apparently felt that extradition was inherently unjust and that asylum state courts could not deny extradition in the face of a legally sufficient demand. Therefore, only the intelligent exercise of gubernatorial discretion could prevent injustice.

In the United States our concern with the protection of individual human rights might justify extradition refusals even when they frustrate the apparently legitimate demands of the demanding state. Nevertheless, in some cases a refusal may constitute an injustice to the demanding state and have the potential to create disharmony between states. Therefore, although

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111. *See Dennis Banks, supra* note 99, at 115.

112. 20 Cal. 3d at 787, 576 P.2d at 487, 144 Cal. Rptr. at 772.

113. *Rendition, supra* note 6, at 52-53. *See* Sweeney v. Woodall, 344 U.S. 86, 89 (1952); State v. Coughlin, 90 Wash. 2d 835, 841-43, 586 P.2d 1145, 1148-49 (1978). *But cf.* Johnson v. Dye, 175 F.2d 250 (3d Cir. 1949), *rev'd on procedural grounds*, 338 U.S. 864 (1949) (the court of appeals found that the petitioner should be released on habeas corpus because he had been subjected to previous due process violations in the demanding state).

the court's policy argument in favor of discretion is appealing, it should be noted that without any checks or balances such as those in the appellate process, the potential exists for abuse of gubernatorial discretion through unwarranted refusals.

The asylum state governor should avoid denials that are justified only by judging the adequacy of the demanding state's criminal justice system. The *Brown* court found that situations where the offense is not a crime in the asylum state, or where the fugitive's physical safety or right to a fair trial is in jeopardy in the demanding state, are examples of circumstances where discretion could be exercised to prevent injustice. However, the denial of extradition in these circumstances would constitute a possibly unwarranted judgment of the demanding state's criminal justice system. Denials of this type have historically caused most of the interstate friction.[114] Therefore, it is arguable that *Brown*'s public policy argument is invalid to the extent that it advocates such denials.

Although a discretionary duty is supported by the public policy consideration that equitable factors must not be neglected, the court's discussion of the pertinent case law and legislation does not present a convincing argument for discretion. First, California dispensed with strict separation of powers long ago. As the Mosk opinion emphasized, California courts have been issuing mandamus to the governor for over a century. Second, *Dennison*, which the majority relied on to support its decision, could be interpreted as applying only to federal courts. Although *Dennison*'s application to state courts had been generally accepted, and the concept of an unenforceable extradition duty had been specifically approved in the dicta of several state courts, no state court had faced that exact issue before *Brown*. Third, the California UCEA, the United States Constitution, and federal legislation certainly seem to indicate a mandatory duty through their express wording. This is particularly true with the California version of the UCEA, since the legislature dropped possibly discretionary wording in favor of express mandatory language. Fourth, the *Brown* court used the same ambiguous rationale to describe the nature of the extradition duty as the Supreme Court did in *Dennison*. The court said that "although the Governor's duty may be characterized as

114. *Interstate Rendition, supra* note 6, at 110-11.

'mandatory,' " it is not judicially enforceable.[115] This seems to be a contradiction in terms, since a "mandatory" or "ministerial" duty is precisely the type of duty that is judicially enforceable through mandamus.[116] Fifth, according to Justice Mosk the contemporaneous administrative construction by California governors was not characteristic of a discretionary duty because of communications made by the governors explaining the violation of their extradition duty.[117] This argument is not entirely convincing because, even with a discretionary duty, there may be a strong expectation that a governor's response will usually conform to a certain norm; and custom may also dictate some explanation for nonconformity. Nevertheless, Justice Mosk's observation does vitiate to some extent the majority's contemporaneous administrative construction argument.

When all of these factors are considered, the *Brown* rationale begins to look a little wan. The best explanation for this apparent judicial legislation is simply that *Dennison*'s wide acceptance has carved out an exception to the general principle of extradition, in spite of the express mandatory wording of all the legislation encountered by the court and in spite of the possibility that *Dennison* might have been intended to apply only to federal courts. *Dennison* has created a type of hybrid duty—a mandatory but unenforceable duty—which by its unenforceability implicitly confers a discretionary power. It is a *mandatory* duty that mandamus cannot touch. Since public policy favors gubernatorial discretion in some instances to protect the individual, the result is not undesirable, even though it may sometimes hinder the objectives of the demanding state. Nevertheless, this discretionary power should not be abused; governors should avoid refusals that result in injustice to the demanding state or that protect no substantial individual rights or interests.

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115. 20 Cal. 3d at 768, 576 P.2d at 475, 144 Cal. Rptr. at 760.

116. BALLENTINE'S LAW DICTIONARY 803 (3d ed. 1979); BLACK'S LAW DICTIONARY 866 (5th ed. 1979). *See, e.g.*, Jenkins v. Knight, 46 Cal. 2d 220, 222-23, 293 P.2d 6, 7 (1956) (writ of mandamus can be issued to "compel a governor to perform ministerial acts required by law").

117. 20 Cal. 3d at 785 n.2, 576 P.2d at 486 n.2, 144 Cal. Rptr. at 771 n.2 (Mosk, J., dissenting).

V. Alternatives to Prevent Abuse of Discretion

A. Areas of Potential Abuse

Justice Mosk stated in *Brown* that the "interests of an effective and impartial criminal justice system and the prevention of discord and retaliation among the states of the union" would best be preserved by a mandatory duty to extradite enforceable by mandamus.[118] Undeniably, a discretionary power creates a potential for discord and strife between states. *South Dakota v. Brown* and *Kentucky v. Dennison* are not isolated examples of situations where the demanding state was displeased with a refusal to extradite.[119] While these two cases are more prominent, some denials not contested in court also resulted in serious interstate disharmony. For example, one governor retaliated against a refusal by paroling a prisoner in his state on the condition that he go to the asylum state.[120] Therefore, in view of governors' definite discretionary power, efforts to promote harmony among the states and an effective criminal justice system should be directed towards preventing the unwarranted exercise or abuse of discretion that might cause contention between states.

One abuse of discretion that could result in strife between states is that of inaction on the part of the asylum state governor. Mandamus may still be an important tool in promoting harmony in such a situation. For instance, both the majority and the dissenting justices in *Brown* were disturbed by Governor Brown's failure to take any action on the extradition demand.[121] The majority expounded the principle that even though the governor's discretion may not be controlled by mandamus, a court through mandamus may compel the governor to act, *i.e.*, make him say either yes or no.[122] Thus, in those jurisdictions that will issue mandamus to the governor, it may be used to compel a governor to act upon the extradition demand of a sister state.

The greatest problems with interstate harmony from the governor's use of his discretionary power seem to arise in certain specific areas. Denials based on equitable pleas have caused little strife in the past because they contain no implicit criticism of

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118. *Id.* at 787, 576 P.2d at 487, 144 Cal. Rptr. at 772.

119. *See Interstate Rendition, supra* note 6, at 110-11.

120. *Id.* at 111 n.74.

121. 20 Cal. 3d at 780, 576 P.2d at 483, 144 Cal. Rptr. at 768; *id.* at 787, 576 P.2d at 487, 144 Cal. Rptr. at 772 (Mosk, J., dissenting).

122. 20 Cal. 3d at 780, 576 P.2d at 483, 144 Cal. Rptr. at 768.

the demanding state.[123] Such denials are usually not opposed, and the demanding state's requisition has occasionally been withdrawn. This has traditionally been recognized as an appropriate area for the exercise of discretion.[124]

One type of denial that has produced some discord is the denial that is not accompanied by adequate explanation.[125] One governor indicated that such denials sometimes result in retaliatory extradition refusals.[126] One solution might be an amendment to the uniform legislation requiring that a comprehensive written report accompany each denial. This provision would discourage denials that have no adequate basis and foster documentation of those denials that do. Thus, retaliatory refusals and discord would hopefully be eliminated.

Another problem area includes denials of extradition based on substantive defenses. Such denials are infrequent, being primarily limited to occasional alibi evidence defenses,[127] but they have been a source of friction because the demanding state often feels that the jurisdiction of its judiciary has been undercut.[128]

The greatest conflict has resulted from denials based on past or prospective due process violations in the demanding state.[129] Even if based on constitutional or statutory grounds, such denials place the asylum state governor in the delicate position of being a judge of the demanding state's criminal justice system.[130] Denials on due process grounds have resulted in cascading retaliatory denials in the past and have caused friction throughout a much broader range of interstate relations.[131]

B. Possible Solutions

One solution to problems with the substantive defense and due process denials would be to arrange for the fugitive's return through other than the traditional extradition process.[132] There

123. *Interstate Rendition, supra* note 6, at 109-110.
124. *Id.* at 110.
125. *Id.*
126. *Id.*
127. *Id.* at 107.
128. *Rendition, supra* note 6, at 56.
129. *Interstate Rendition, supra* note 6, at 110.
130. *Id.* at 110-11; *Rendition, supra* note 6, at 56 & n.33.
131. *Interstate Rendition, supra* note 6, at 110-11 & n.74.
132. Several uniform acts provide for the *return*, not extradition, of individuals subject to their provisions, *i.e.*, an entirely different procedure that eliminates the governor's participation. *Rendition, supra* note 6, at 50-51 n.10. An exception is the Uniform Recip-

are several uniform acts that may serve such a purpose under certain factual conditions.[133] These acts, such as the Uniform Act for Out-of-State Probationer or Parolee Supervision, deal primarily with nonfugitive situations but can be adapted to fugitives who also fulfill their factual preconditions.[134]

One commentator has suggested a solution, the substantial interest test, which would uniformly solve the problem of ill-advised denials with their resultant disharmony. Under this test, the interest of the asylum state in keeping the fugitive, if first determined to be substantial, would be balanced against the interest of the demanding state in reacquiring the fugitive.[135] The demanding state's interest would always be considered substantial; only the *degree* of substantiality would be evaluated.[136] This test would result in the elimination of due process and substantive defense denials, since the asylum state would have no substantial interest in such claims.[137] If the governor were to apply such an extensive test to all extradition demands, denials suffering from inadequate reasoning would be discouraged. Theoretically, the denials would be limited to equitable considerations that involve interests of the asylum state which are more important than the interest of the demanding state in recovering the fugitive. Since reciprocity would be desirable, the substantial interest test could be uniformly enacted throughout the states by a joint agreement or compact between the governors.[138]

The substantial interest test would help eliminate some of the discretionary elements leading to disharmony. Additionally, it would provide some flexibility. Even in a situation where the state would normally not be considered to have a substantial interest, *e.g.*, in the case of a fugitive who is only temporarily in the asylum state, significant public interests in denial might constitute a sufficiently substantial interest to warrant denial.

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rocal Enforcement of Support Act, which provides for the rendition of an individual only through the normal extradition procedure, but allows the demanding-state courts to obtain jurisdiction over the defendant while the defendant is still in the asylum state. UNIFORM RECIPROCAL ENFORCEMENT OF SUPPORT ACT §§ 5-6, 11, 14, 18 (1968 version).

133. *See, e.g.*, INTERSTATE AGREEMENT ON DETAINERS; INTERSTATE COMPACT ON JUVENILES; UNIFORM ACT FOR OUT-OF-STATE PROBATIONER OR PAROLEE SUPERVISION; UNIFORM ACT TO SECURE THE ATTENDANCE OF WITNESSES.

134. *See Rendition, supra* note 6, at 50-51 n.10, 57.

135. *Interstate Rendition, supra* note 6, at 116-17.

136. *Id.* at 116.

137. *Id.*

138. *Id.* at 117.

No matter what procedures are developed to determine the advisability of denial, the key to avoiding disharmony is making certain that the procedures are uniformly instituted and accepted throughout the states.[139] This could be accomplished through an interstate executive agreement among the governors, as was suggested in conjunction with the substantial interest test. The primary problem with such an arrangement is the absence of any mechanism to review the governor's decision in order to prevent arbitrary denials. The effectiveness of any procedures would depend upon the governor's determination to prevent interstate friction by wisely exercising his discretionary powers according to the uniform procedures. Even so, the presence of uniform procedures would make the response of individual governors more predictable. A state would know when denial may be expected, and discord would be less likely to result.

VI. Conclusion

Although the asylum state governor's extradition duty appears to be mandatory under the express language of the Constitution and federal legislation, *Kentucky v. Dennison* established a precedent for gubernatorial discretion that did not expressly extend to the states, but which appears to have been accepted by them. The decision in *South Dakota v. Brown* reinforced the pervasiveness of the *Dennison* rationale, which established the idea of the hybrid duty in the case of extradition—a mandatory but unenforceable duty. The practical result is that the asylum state governor possesses discretionary power. While public policy favors such a result to the extent that it protects the individual; the governor should first determine whether the courts of the demanding state have considered or will consider the factors that the governor finds compelling. If these factors will be considered, then the fugitive should be returned to the demanding state in accordance with the theory behind extradition, *i.e.*, the fugitive should be returned to the state having a vested interest in prosecuting the fugitive or meting out some punishment to him.

Since the governor's discretionary power is not subject to control by the courts, specific guidelines should be developed to determine when extradition should be denied. Abuse of discre-

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139. *See id.* at 117 n.105 ("[The] true remedy for discretion is agreement between governors, not federal legislation.")

tion and ill-advised denials have created disharmony in the past and should be avoided. One commentator has suggested a substantial interest balancing test, where extradition would be denied only where the interest of the asylum state is substantial and greater than the substantial interest of the demanding state. This test is a good one because it would favor the exercise of discretion only when there was an equitable plea involving an interest of the asylum state. The asylum state governor would not be put in the position of acting as the judge of the demanding state's criminal justice system, because any denials would be based on an overriding interest of the asylum state. Traditionally, such denials have caused little disharmony.

No matter what procedures are developed to deal with the governor's discretionary power, they should be instituted uniformly throughout the states. These procedures could be implemented uniformly by an interstate executive agreement between the governors. Although such an agreement could not guarantee the prudent exercise of discretion, it would certainly reduce the incidence of arbitrary denials by establishing a norm to which governors will be expected to adhere. The desire to preserve interstate harmony will be an impetus for conformance. In essence, such uniformity will result in predictability,[140] and if a state knows when denials may be expected, the denials will likely be accepted without disharmony or reprisal.

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140. *Interstate Rendition, supra* note 6, at 120.